

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES BRITT)	
Claimant)	
VS.)	
)	
THERATRONICS INTERNATIONAL, LTD.)	Docket No. 184,811
Respondent)	
)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant requested review of the February 28, 1997, order entered on the record by Administrative Law Judge Jon L. Frobish.

ISSUES

Claimant asserts the Administrative Law Judge erred in denying claimant's motion to pay the award and assess penalties under K.S.A. 44-512a and in finding K.S.A. 1996 Supp. 44-556 could be applied retroactively to claimant's action, limiting respondent's obligation to pay benefits for the ten-week period preceding the Appeals Board's decision and during the pendency of the appeal to the Court of Appeals.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The order entered February 28, 1997, by Administrative Law Judge Jon L. Frobish should be affirmed.

On May 11, 1995, Administrative Law Judge Shannon S. Krysl entered an Award for workers compensation benefits which was timely appealed to the Appeals Board. On October 10, 1995, the Appeals Board determined the award of the Administrative Law Judge should be modified to permanent partial disability benefits based upon a 40 percent work disability rather than the 84 percent found by the Administrative Law Judge. Respondent filed its Notice of Appeal to the Kansas Court of Appeals on November 7, 1995, appealing the decision of the Appeals Board. On January 7, 1997, demand for payment pursuant to K.S.A. 44-512a was sent by claimant's counsel to respondent and its insurance carrier.

Subsequently, the Workers Compensation Fund filed a Motion to Determine Benefits Due to Claimant Under K.S.A. 1996 Supp. 44-556. On February 28, 1997, Judge Frobish, following the Appeals Board's decision in Cassady v. Metz Baking Company, Docket No. 162,695 (February 1996), determined the benefits due claimant were controlled by K.S.A. 1996 Supp. 44-556, which applied retroactively to an injury which occurred prior to the 1993 amendments to the Workers Compensation Act.

Before the 1993 amendments, K.S.A. 44-556(c) read in pertinent part, "[i]f review of the decision of the district court is sought . . . the compensation payable under the decision of the district court shall not be stayed pending such review." However, in 1993 K.S.A. 44-556 was amended. K.S.A. 1996 Supp. 44-556 now provides, in pertinent part:

“(b) Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.”

Claimant argues K.S.A. 1996 Supp. 44-556(b) should not be applied retroactively to his injury which occurred in 1991. By applying K.S.A. 1996 Supp. 44-556(b) retroactively to claimant's action, claimant would not be entitled to a lump-sum payment of compensation but rather payment of compensation for the ten-week period preceding the Appeals Board's October 10, 1995, decision and during the pendency of the appeal to the Court of Appeals. Therefore, claimant asserts the 1993 amendments to the Workers Compensation Act do not apply; instead, the law in effect at the time of his 1991 injury should govern the case.

However, statutory and case law contradict claimant's argument. In Hall v. Roadway Express, Inc., 19 Kan. App.2d 935, 943, 878 P.2d 846 (1994), the Court of Appeals determined that the language in K.S.A. 44-556(c) indicates that when review is sought on any order issued after October 1, 1993, the current procedural provisions control. Review shall be in accordance with the procedural provisions of the Workers Compensation Act, as all such provisions existed at the time of the order from which such review is sought. Therefore, it is the date the order of the Administrative Law Judge is filed which will determine whether the pre- or post- 1993 amendments to K.S.A. 44-556 apply. See McClure v. Rodricks, 20 Kan. App.2d 102, 106, 883 P.2d 1228 (1994). The date of claimant's injury is not controlling. See Rios v. Board of Public Utilities of Kansas City, 256 Kan. 184, 192, 883 P.2d 1177 (1994). In the case at hand, all orders were issued after October 1, 1993; it follows, therefore, the 1993 procedural amendments apply to claimant's action.

The Kansas Supreme Court determined in Rios that the 1993 amendments to K.S.A. 44-556 and K.S.A. 44-551, in so far as they relate to judicial review of an order entered under the Workers Compensation Act, are procedural in nature. They only affect the body hearing an appeal not the substance of the appeal. Therefore, these provisions may be applied retrospectively. See Rios at 191.

Similarly, the 1993 amendment to K.S.A. 44-556(b), as it relates to the time for paying compensation pending an appeal, merely affects the mode or procedure for payment of compensation benefits during the pendency of an appeal to the Court of Appeals. As such, the amendment to K.S.A. 44-556(b) is procedural. The general rule regarding statutory construction is that a statute operates prospectively absent clear language that it is to operate retrospectively. See Harding v. K.C. Wall Products, Inc., 250 Kan. 655, Syl. ¶ 4, 831 P.2d 958 (1992). However, this rule is modified when the change is merely procedural. Such procedural changes do not affect the vested rights of the parties and may be given retrospective effect even absent a clear expression of legislative intent. See Lakeview Village, Inc. v. Board of Johnson County Comm'rs, 232 Kan. 711, 720, 659 P.2d 187 (1983); and Rios at 191. The 1993 amendment to K.S.A. 44-556(b) does not affect any vested rights of the parties; it is a timing issue only. Therefore, K.S.A. 1996 Supp. 44-556(b) can apply retrospectively to claimant's 1991 injury.

It is clear from the facts of this case that respondent timely appealed the decision of the Appeals Board to the Court of Appeals and, therefore, respondent's only obligation pursuant to the statute is to pay benefits for the ten-week period preceding the Appeal's Board October 10, 1995, decision and during the pendency of the appeal, less any amounts previously paid.

In line with the Cassady decision, the Appeals Board finds the lump-sum payment of compensation was not due pursuant to K.S.A. 44-512a in that the time for the appeal to the Court of Appeals had not expired. Penalties would not be appropriate because the decision of the Appeals Board would not be final until the time for appeal to the Court of

Appeals expired. Therefore, compensation could not have been past due per K.S.A. 44-512a.

It is noted that the Court of Appeals entered its decision in this case on March 28, 1997, affirming the Appeals Board's October 10, 1995, decision.

WHEREFORE, it is the decision of the Appeals Board that the order of Administrative Law Judge Jon L. Frobish entered February 28, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff C. Spahn, Jr., Wichita, KS
Douglas D. Johnson, Wichita, KS
Randall C. Henry, Hutchinson, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director